

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA C. RAUSCH)	
Claimant)	
)	
VS.)	
)	
SEARS ROEBUCK & CO.)	
Respondent)	Docket No. 1,039,744
)	
AND)	
)	
INDEMNITY INS. CO. OF N. AMERICA)	
Insurance Carrier)	

ORDER

Both parties requested review of the April 19, 2010 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on July 7, 2010.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for the claimant. Brent M. Johnston of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant benefits for a 9.5 percent functional impairment and separately awarded claimant benefits for a 52 percent work disability beginning August 1, 2008. Both claimant and respondent requested review by the Board.

Claimant requests review of the nature and extent of disability, specifically the calculation of her task loss. Claimant further requests review of whether she is entitled to temporary partial disability compensation from April 2008 through November 6, 2008, and payment of unauthorized medical compensation to Dr. Fluter.

Respondent raises the following issues on review: (1) whether claimant's accidental injury arose out of and in the course of employment with respondent; (2) whether claimant gave timely notice; and, in the alternative, (3) the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a "receiving lead" at the Sears Towne East store. Her job duties included unloading trucks, scheduling, supervising other employees and receiving packages off trucks. Claimant alleges that she suffered accidental injuries to her upper extremities, shoulders and neck as a result of heavy lifting for respondent, while unloading merchandise from delivery trucks from January 2008 through March 2008. Claimant testified that she talked to several of her supervisors about her upper extremity problems, but was never offered medical treatment. Claimant testified that she told Jim Kiser, the store's general manager, Lisa Hopkins, respondent's human resources lead, Pierre Njanga, claimant's direct supervisor and respondent's operations manager, and Gary Andres, respondent's loss prevention manager about her upper extremity problems and that they were work-related.

Respondent's representatives deny that claimant told them that her problems were work-related. And in contrast, in May 2007 claimant had previously filed a workers compensation claim against respondent for an injury to her left wrist. She followed standard procedure by reporting her injury to respondent's loss prevention and received treatment from respondent's designated medical provider.

Respondent's witnesses acknowledge knowing that claimant was having problems with her shoulders. In particular, claimant was seen avoiding any lifting while at work. But, when claimant was asked, she denied the problems were work-related. In fact, Mr. Njanga was aware that claimant was having shoulder problems as early as late September 2007. Mr. Njanga told claimant to stop assisting with the unloading. This change in job duties was at the direction of Mr. Njanga and claimant was told to stop doing anything which would exacerbate her problems.¹

Mr. Njanga testified that sometime between September and November 2007, he became aware that claimant was taking medication for shoulder pain and he told her not to perform any lifting or unloading of trucks. And Mr. Njanga specifically asked claimant if her shoulder injury happened at work and claimant assured him it did not happen at work. Mr. Njanga testified:

¹ Njanga Depo. at 14.

Q. And I'm not asking you about when you first started talking to her about shoulders problems. I'm asking you when she told you I had a work injury to my shoulder.

A. Well, actually, she did not.

Q. Okay. Tell me about your conversations with her.

A. My conversation, you know, with Tina was in relation, you know, to her suffering from shoulders, having, you know, some pain for which she was taking some, you know, medication. And I point blank asked her if, in fact, it happened on the job site, if it was sustained at work, to which she told me no, it did not.²

Mr. Gary Andres, respondent's loss prevention manager, testified that he recalled a conversation with claimant in October 2007 and she told him that she had an injury and couldn't lift because her shoulders were sore. Mr. Andres asked claimant if her injury was work related and she told him that it was not.

James Kyser, respondent's store manager, testified that in early January 2008, he had observed claimant at work and asked why she was not helping take product out of a truck. Claimant told him that her shoulder was hurting and Mr. Kyser asked if claimant had injured her shoulder at work. Claimant told Mr. Kyser that her shoulder injury was not work related. Mr. Kyser testified:

Q. When you had the discussion with her about shoulder and/or neck pain, did you ask her, affirmatively, whether those problems were in any way related to her work?

A. Yes, I did, and she said no.

Q. What was her reply?

A. No, they were not work-related.³

Lisa Hopkins, respondent's human resource lead, is involved in the hiring and firing of employees as well as the personnel paper work for FMLA, workers compensation and payroll. Ms. Hopkins testified she did have a conversation with claimant regarding her shoulder pain in January 2008. When asked whether it was work related, claimant advised her that it was not.

² *Ibid.* at 5-6.

³ Kyser Depo. at 6.

Q. Miss Rausch testified at the preliminary hearing on page 33 that she told you personally more than ten times that she had this work injury. Is that a true statement?

A. No, that's not.

Q. She testified on page 11 that she told you specifically about an injury she had while unloading a truck. Is that true?

A. No.⁴

On redirect examination, Ms. Hopkins testified:

Q. Just briefly, Miss Hopkins. Mr. Riedmiller asked you some questions about asking Miss Rausch why or how her shoulders were injured. You did inquire whether or not it was a work injury. Correct?

A. Yes.

Q. And she told you no.

A. Yes.

Q. And at that point you left it up to her if she wanted to volunteer anything in case it was a personal medical condition.

A. Yes.

Q. And although she may not have told you how she injured her shoulders, she did tell you it wasn't at work.

A. Yes.⁵

On January 10, 2008, claimant sought medical treatment at GraceMed Health Clinic due to pain in her neck, shoulders and upper extremities. Dr. Paula Worley prescribed some pain medication and placed restrictions on claimant. Claimant presented the restrictions to respondent and was provided accommodated work continuing to manage employees and doing paperwork.

On March 28, 2008, claimant's employment was terminated. Claimant had failed to lock up electronic merchandise at night and had repeatedly stated she had locked the

⁴ Hopkins Depo. at 11-12.

⁵ *Ibid.* at 52.

cage even though video footage showed she had not.⁶ And claimant had improperly scanned products into the computer before the customers received the product in order to make it appear the customers had received their products within the respondent's guaranteed delivery time of five minutes.⁷

On April 10, 2008, claimant provided respondent with a written claim for compensation. The written claim indicated the accident occurred sometime in January 2008 and further noted that the injury occurred January 2008 through March 28, 2008. However, at the June 17, 2008 preliminary hearing claimant testified that she never lifted more than 5 pounds at work after January 10, 2008, and her condition never worsened after that date.

Respondent's representatives testified the April 10, 2008 written claim was the first time they were told claimant was alleging a work-related injury other than hearsay from the person escorting her from the store on the day she was terminated. The person who escorted her from the State stated that claimant had threatened a workers compensation claim.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁹

Initially, it is significant that claimant had filed a workers compensation claim against respondent before the instant alleged accidental injury. She was clearly aware of the procedure to file a claim for a work-related injury. But in this instance she sought medical treatment on her own and although she states otherwise, the respondent's representatives denied she either claimed a work-related injury or requested medical treatment. Instead, she told the supervisors that her shoulder problems were not work-related. Upon becoming aware that claimant had shoulder complaints, respondent told her to alter her work activities. And upon receipt of her restrictions the respondent continued to accommodate her work activities.

It is additionally significant to note that claimant's lifting duties were suspended in late 2007 and claimant agreed that after January 10, 2008, she did not lift over 5 pounds

⁶ Reynolds Depo. at 7.

⁷ *Ibid.* at 7-8.

⁸ K.S.A. 2008 Supp. 44-501(a).

⁹ K.S.A. 2008 Supp. 44-508(g).

and her condition never worsened. And yet this is the same time period claimant now alleges that lifting at work caused her injuries. Moreover, the respondent's witnesses all questioned claimant and received the same response that her shoulder and neck problems were not work-related.

It is simply not credible that claimant had told the various supervisors on multiple occasions that she had hurt her shoulder at work. Claimant was aware of the procedure to not only report an accident but also how to request medical treatment. She had done so on a previous workers compensation claim against respondent and had been provided medical treatment. In this instance she continued to work and receive medical treatment but did not institute a workers compensation claim until after she was terminated. And the time period during which she now alleges she suffered repetitive injuries from lifting was the same time period that she was no longer lifting at work. Moreover, at a preliminary hearing on this claim she had testified that as she worked during this time period she did not lift anything over 5 pounds and her condition did not worsen. Finally, the circumstances surrounding her termination raise further questions regarding claimant's credibility. The preponderance of the credible evidence establishes that claimant did not suffer accidental injury arising out of and in the course of her employment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated April 19, 2010, is reversed. Claimant did not meet her burden of proof to establish that she suffered an accidental injury arising out of and in the course of employment.

IT IS SO ORDERED.

Dated this 31st day of August 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Brent M. Johnston, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge